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No. 672

In the

Supreme Court of the United States

OCTOBER TERM, 1958

AURELIO ZACARIAS,

v.

UNITED STATES OF AMERICA

PETITION OF AURELIO ZACARIAS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Aurelio Zacarias respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit which dismissed your petitioner's appeal from an order and judgment of the United States District Court for the Western District of Texas, El Paso Division, denying petitioner's motion to suppress evidence.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet recorded. It is set out in the transcript of the record in that Court. (R. 92.)

JURISDICTION

The judgment of the Court of Appeals was made and entered on December 2, 1958. Petitioner duly and timely filed his petition for rehearing on December 18, 1958. (R. 97.) The Court of Appeals made and entered its order denying the same on January 5, 1959. (R. 100.)

The jurisdiction of this Court is invoked under *28 U. S. C. A., §1254(1)* and *United States Supreme Court Rule 19, §1(b), 28 U. S. C. A.* wherein it provides that a writ of certiorari may be granted where a Court of Appeals has rendered a decision in conflict with the decisions of another Court of Appeals on the same subject matter. A conflict is admitted in the opinion rendered by the Court of Appeals herein. (R. 95.) In addition, the opinion of the Court of Appeals herein is in conflict with applicable decisions of this Court on the same matter.

QUESTIONS PRESENTED

1. Whether an order by a District Court overruling and denying a motion brought prior to indictment to suppress evidence under *Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.*, is a final order which can be appealed.

2. Does information (a tip) from an unidentified informer, without more, given to a customs agent, who in

turn relays such information to another customs agent who makes an arrest, constitute reasonable grounds under *26 U. S. C. A., §7607* for a legal arrest where there was no warrant of arrest or search warrant?

STATUTES INVOLVED

The pertinent statutes involved are *Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.; 26 U. S. C. A., §7607* and *28 U. S. C. A. §1292*. The constitutional provision involved is the Fourth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was arrested in El Paso, Texas on July 26, 1958 by United States Customs Agent without a warrant for his arrest or a search warrant of his person. (R. 42.) The Customs Agent searched petitioner and had certain narcotics taken from his possession. On July 28, 1958 he was taken before the United States Commissioner where a complaint was filed against him. On August 18, 1958 the United States Commissioner held a preliminary examination and found that there was probable cause that petitioner had committed an offense and he was held to answer to the District Court. He was then released on bail.

Prior to indictment petitioner filed and presented his motion to suppress as evidence the narcotics found on and taken from him. The motion was filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure 18 U. S. C. A. Petitioner alleged that the items taken were illegally

seized and taken without either a search warrant or a warrant for his arrest. The arresting officers did not know, nor did they claim that he had a prior record or reputation for dealing in narcotics before the date of his arrest. (R. 67, 76.) They did not know of a narcotics crime or violation taking place in their presence immediately prior to the arrest of petitioner. (R. 26, 50.) A hearing was had on the motion and the District Court denied it. Petitioner excepted to the trial Court's judgment and timely filed his notice of appeal on September 4, 1958 to the United States Court of Appeals. (R. 80-81.) On December 2, 1958 the Court of Appeals entered its judgment dismissing petitioner's appeal on the ground that the order appealed from by him was an interlocutory order and therefore not appealable. Petitioner timely filed his petition for rehearing which was overruled on January 5, 1959.

REASONS FOR GRANTING WRIT

Presented are important questions which have been given conflicting decisions and opinions by the Courts of Appeal and they need to be resolved for the fair and uniform administration of justice in the Federal Criminal law.

The decision herein of the Fifth Court of Appeals that an order denying motion to suppress evidence, brought and heard prior to indictment pursuant to Rule 41 (e) of the *Federal Rules of Criminal Procedure 18 U. S. C. A.* is not a final order and therefore not appealable, conflicts with the decision of the Ninth Circuit Court of Appeals in the case of *Freeman v. United States, 160 Fed. 2d 69.* This

conflict is admitted in the opinion by the Court of Appeals in your petitioner's case. (R. 95.) Petitioner also contends that the opinion of the Fifth Circuit Court of Appeals in the case herein is also in conflict with the decision of the vast majority of the other Courts of Appeal which hold that if a motion to suppress evidence is filed and the order entered before the indictment is returned, then such order is final and independently appealable. See: *Centracchio v. Garrity, 198 Fed. 2d 382; United States Court of Appeals for the Second Circuit, In Re: Fried, 161 Fed. 2d 463; United States v. Poller, 43 Federal 2d 911; Cheng Wai v. United States, 125 Fed. 2d 915; Milburne v. United States, 77 Fed. 2d 310 (Ct. of Appeals, 3rd Cir.); In Re: Sana Laboratories, 115 Fed. 2d 717. Lapides v. U. S., 215 Fed. 2d 253.* The decision of the Court below is also in conflict with this Court's applicable decisions on the same subject matter. See *Perlman v. United States, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; Burdeau v. MacDonald, 256 U. S. 465; 41 S. Ct. 574; 64 L. Ed. 1048; Cogen v. United States, 278 U. S. 221; 49 S. Ct. 118; 73 L. Ed. 275; Go-Bart Importing v. United States, 282 U. S. 344; 51 S. Ct. 153; L. Ed. 374.*

The decision of the Court of Appeals herein to dismiss your petitioner's appeal from the trial Court's order denying his motion to suppress evidence brought prior to indictment is clearly erroneous. Not only is such decision in conflict with the majority opinions cited in the cases above, but it is also in violation of petitioner's constitutional rights under the Fourth Amendment of the United States

Constitution and the opinions of this Court's decisions in *Johnson v. United States, 33 U. S. 10; 92 L. Ed. 46; Jeffers v. United States, 72 S. Ct. 93; 343 U. S. 48; 96 Law Ed. 59; United States v. Di Re, 332 U. S. 581; 92 L. Ed. 210; McDonald v. United States, 335 U. S. 451; 93 L. Ed. 451; Giordinello v. United States, 2 Law Ed. 2d 30; 78 S. Ct. 66.*

ARGUMENT UNDER POINT ONE

The Court below erred in dismissing Petitioner's Appeal from the Trial Court's order denying his motion to suppress evidence when the motion was heard and the order entered before the indictment was returned.

The weight of authority in the cases cited above hold that if a motion is filed under Rule 41 (e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. and the order thereon is entered before the indictment is returned, then such order is final and independently appealable. The case of *United States v. Williams, 227 Fed. 2d 149* cited by the Court of Appeals in the case herein and found on P. 95 of the record herein is not applicable to the facts of this case. In that case the motion to suppress evidence was ruled on after indictment. Furthermore, another line of cases hold that even such orders ruled on after indictment are final and independently appealable. *In Re: Sana Laboratories*, supra, and *United States v. Poller*, supra.

The contention of the Court of Appeals in this case that the motion to suppress evidence which was heard and ordered denied prior to indictment is interlocutory and

therefore not appealable is not a valid holding because such an order as in effect an interlocutory order refusing an injunction, the injunctive relief being that the Government be ordered not to offer the alleged illegally obtained evidence upon trial. It would then be a type of interlocutory order then immediately appealable under *28 U. S. C. A., § 1292.* However, petitioner urge that an order denying motion to suppress evidence would be appealable whenever the motion is filed before an indictment is returned, and particularly when such motion has been ruled upon before an indictment is returned. As was said in *Cogen v. United States*, supra, "the independent character of the summary proceedings is clear, even when the motion is filed in a criminal case * * * where if the motion is filed before there is any indictment or information against the movant * * *."

ARGUMENT UNDER POINT TWO

The Courts below erred in denying Petitioner's motion to suppress the evidence seized and taken from him as a result of an illegal arrest.

The legality of the arrest of petitioner is to be determined under *26 U. S. C. A., § 7607.* Petitioner was arrested without a warrant and just prior to his arrest he was not committing a violation of law in the presence of the arresting officer. (R. 43, 50.) Further, the arresting officers did not have reasonable grounds to believe he was committing or had committed a violation of any law of the United States relating to narcotic drugs. Their only ground for making

the arrest was based upon uncorroborated information from an informer whose identity and reliability were unknown, and such ground, standing alone, does not constitute probable cause or reasonable grounds for a valid arrest without a warrant. *Ponti v. United States, 215 Fed. 2d 324; Riteson v. United States, 222 Fed. 2d 556; Worthington v. United States, 166 Fed. 2d 557.* Therefore, the incidental search and seizure of petitioner was unlawful and in violation of his rights under the Fourth Amendment of the United States Constitution and the fruits of such illegal search should have been suppressed as evidence. *Giordinello v. United States, supra; Johnson v. United States, supra; States v. Di Re, supra.*

A similar point has been raised in the case of *James A. Draper v. United States, 248 Fed. 2d 295*, petition for writ of certiorari granted by this Court on June 30, 1958 No. 136 of this Court's docket (now pending). However, in the instant case, the facts are very much weaker for the Government to constitute reasonable grounds to believe that the person arrested had committed or was committing a violation. There was no identification of the informer and he was not an agent of the Customs. (R. 48.) There was no proof of the reliability of the original source of the information, to-wit: the informer. Not only was hearsay used, but double hearsay was involved in the instant case. (R. 50-51.) We submit that such hearsay evidence, without more, does not constitute probable cause or reasonable grounds for valid arrest without a warrant. QUERY: If hearsay alone

can constitute reasonable grounds or probable cause, at what point does hearsay cease being sufficient?

CONCLUSION

For the reasons set out herein, the petition should be granted and the writ of certiorari issued, and that the judgment of the Court of Appeals for the Fifth Circuit, and the trial court be reversed.

Respectfully submitted,

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APPENDIX

Statutes Involved

18 United States Code, Rule 41 (e) of the Federal Rules of Criminal Procedure:

> "(e) Motion to Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

26 United States Code, Section 7607.

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs [as defined in section 401 (i) of the Tariff Act of 1930, as amended; 19 U. S. C. Sec. 1401 (i)] may—
>
> "(1) carry firearms, execute and serve search warrants and arrest warrants, and serve sub-

poenas and summonses issued under the authority of the United States, and

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

28 United States Code, Section 1292.

"(a) The Courts of Appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this

section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

UNITED STATES CONSTITUTION, Fourth Amendment.

"The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly described the place to be searched and the persons or things to be seized."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17440

AURELIO ZACARIAS

Appellant,

versus

UNITED STATES OF AMERICA

Appellee,

Appeal from the United States District Court for the Western District of Texas.

(December 2, 1958.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This appeal from an order of the trial court denying appellant's motion to suppress evidence was prosecuted before indictment or trial of appellant. It is attacked by a motion to dismiss, filed by the United States, on the ground that the order of the trial court was interlocutory and thus not appealable.

The record before us discloses that Zacarias was searched without a warrant and had certain narcotics taken from his possession, was then arrested, taken before the United States

Commissioner, where a complaint was filed against him as provided in Rule 5, F.R.Crim.P., 18 U.S.C.A.[1] Zacarias was released on bond, employed counsel and appeared at his commitment hearing. He was bound over to the grand jury. Thereafter, at this stage of the proceedings, he filed his motion to suppress the evidence on the ground that the search

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[1] The rule makes provision for cases in which an arrest is made without a warrant as follows:

"Rule 5. Proceedings before the Commissioner.

(a) Appearance before the Commissioner.

any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer, empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Subsequent proceedings are also prescribed by Rule 5 as follows:

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the Commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

was made without a search warrant, without an arrest warrant and without probable cause for believing that a narcotics violation was being committed or had been committed by Zacarias within the meaning of 26 U.S.C.A. §7607.[2] The trial court heard evidence on the motion to suppress, and entered an order denying it. Thereupon appellant appealed here.

The appealability of this order depends upon whether it is a "final" order of the trial court, as distinguished from an interlocutory order, since the existence of a final order is necessary in order for this court's jurisdiction to attach. 28 U.S.C.A. §1291. The answer to this question is found by determining whether this motion to suppress the evidence is an independent civil proceeding, finally terminated with the order denying the relief or is ancillary to a pending criminal proceeding.

No Supreme Court case has been cited to or been found by us that categorically answers this question. A rather full discussion of the reviewability of such orders is contained in *Carroll v. United States*, 354 U.S. 394. However, in that case an indictment had already been found which, of course, is not the case here. In *Perlman v. United States*, 247 U.S. 7, the Court held that an order denying the motion, before indict-

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[2] "The Commissioner . . . and officers of the Customs . . . may, (1) . . . (2) make arrests without warrants for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." 26 U.S.C.A. §7607.

ment, to enjoin the use of certain documents that had been impounded in previous litigation, was appealable.

In *United States v. Williams*, 4 Cir., 227 F. 2d 149, the court held that an order entered after complaint and after the accused had been bound over to the District Court on a waiver of a commitment hearing, was interlocutory and not appealable. Such was the posture of affairs here, except that here the commitment hearing was held, and, as provided in the rule, Zacarias was bound over to the District Court.

We note that a different view is expressed in a decision by the Court of Appeals for the Ninth Circuit. See *Freeman v. United States*, 160 F. 2d 69. However, we think it quite plain that after a complaint has been issued by a United States commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute "[held] to answer in the district court," a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable.

The appeal is DISMISSED.

JUDGMENT

Extract from the Minutes of December 2, 1958

No. 17440

AURELIO ZACARIAS

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the motion filed by appellee on September 25, 1958 to dismiss the appeal, and on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby, dismissed.

ORDER DENYING REHEARING

Extract from the Minutes of January 5, 1959

No. 17140

AURELIO ZACARIAS

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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OCTOBER TERM, 1958

AURELIO ZACARIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 672

AURELIO ZACARIAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 14-17) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1958. A petition for rehearing was denied on January 5, 1958. The petition for a writ of certiorari was filed on January 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order denying a motion to suppress, made after complaint but before indictment, as to narcotics which could not be subject to an order for

return, was properly held not to be final and therefore not appealable.

RULE INVOLVED

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner seeks review of the order of the Court of Appeals for the Fifth Circuit, dismissing his appeal from an order of the District Court for the Western District of Texas, denying his motion to suppress as evidence narcotics taken from his person on July 26, 1958.

The motion to suppress was filed on August 26, 1958, after complaint and preliminary hearing (R. 1-3, 15), but before indictment. The evidence showed that Forbey, a customs agent (who was not called by petitioner) received information from an informant that petitioner, identified as "Zach," was selling about $4,000 worth of heroin (R. 51-52, 56, 57-58). Other agents were assigned to survey a tourist court where, according to the information relayed to those agents, a sale was to be made (R. 20-21, 56). When the agents started their survey at about 9 o'clock on the morning of July 26, they were given a description of petitioner and a description of his automobile and its license number (R. 22, 43). It was not known at that time who would make the actual delivery at the tourist court (R. 26-27, 55). At about 1:45 p.m., information was conveyed to the surveilling agents by radio that petitioner would be making the delivery in person (R. 34, 37-38, 41-42). At about 2 o'clock petitioner drove his car into the court. As he got out, he was stopped by two agents and searched. Heroin was discovered on his person (R. 23-24, 46).

The district court denied the motion to suppress on September 4, 1958 (R. 79). Petitioner's appeal was dismissed on the ground that, even though no indictment had been returned, the order on the motion, made

after complaint and preliminary hearing and after petitioner had been held for the grand jury, was in the criminal case and not a final order (Pet. App. 14-18). On October 7, 1958, indictments were returned against petitioner charging concealment of heroin on July 26, 1958.

ARGUMENT

The actual holding of the court below on the facts of this case is that an order on a motion to suppress, which does not seek the return of any property, and which, although brought before indictment, was brought after preliminary hearing and a binding over for the grand jury on a charge relating to the evidence at issue, is an order in the criminal case and not appealable by the moving party.[1] As we develop below, petitioner is correct in his assertion that the holding conflicts with decisions in at least one other circuit. The conflict is not, however, as great as petitioner would make it appear nor is the ruling contrary to decisions of this Court since many of the cases cited by petitioner are distinguishable. In view of the recent decisions of this Court in this field we doubt that the conflict, which is with earlier decisions, is one that requires resolution at this time and in this case.

1. This Court has held that actions or motions for the *return of property*, made before indictment (even if they also seek incidental relief of suppression), are independent proceedings so that an order therein is

[1] In narcotics cases, the government has a special right to appeal from an order granting a motion to suppress, whether made before or after indictment, so long as jeopardy has not attached (18 U.S.C. (Supp. V) 1404).

appealable by either side. *Perlman* v. *United States*, 247 U.S. 7. This was applied to a motion for return of papers during the pendency of a hearing on a complaint before a commissioner in *Go-Bart Importing Company* v. *United States*, 282 U.S. 344. These cases have, however, the distinguishing feature that the motion at issue sought, not merely the suppression of evidence, but immediate return of property of the moving party, so that there was an independent equitable basis for the action regardless of what happened in the criminal proceedings. The same distinction applies to a number of Court of Appeals decisions cited by petitioner as being in conflict with the decision below, including *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9), mentioned in the opinion below as reflecting a different view from that taken in this case. See *Hoffritz* v. *United States*, 240 F. 2d 109 (C.A. 9); see also *In re Sana Laboratories*, 115 F. 2d 717 (C.A. 3), certiorari denied, 312 U.S. 688; *United States* v. *Bianco*, 189 F. 2d 716, 717 (C.A. 3); *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2), where orders in proceedings brought after preliminary hearing but before indictment, but granted after indictment, were held appealable.[2] In this case, because the property seized is contraband there is no property which petitioner can get back.

There are other cases cited by petitioner as in conflict with the decision below which, while they involved only a motion to suppress evidence and not the return of property, were brought in anticipation of an indictment, but before there had been a preliminary

[2] Contra: *Nelson* v. *United States*, 208 F. 2d 505 (C.A.D.C.), certiorari denied, 346 U.S. 827; see also *United States* v. *Williams*, 227 F. 2d 149 (C.A. 4).

hearing on a specific charge. *Lapides* v. *United States*, 215 F. 2d 253 (C.A. 2); *Centracchio* v. *Garrity*, 198 F. 2d 382 (C.A. 1), certiorari denied, 344 U.S. 866. The court below had itself previously held that such an order was appealable, *White* v. *United States*, 194 F. 2d 215 (C.A. 5), certiorari denied, 343 U.S. 930; see also *Foley* v. *United States*, 64 F. 2d 1 (C.A. 5). These cases are not in conflict with the decision below since that decision rests on the proposition that the complaint before the commissioner and the binding over to the grand jury were the start of a specific criminal proceeding to which the order on the motion to suppress should be related.[3]

The actual holding below is in direct conflict only with decisions in the Second Circuit:—*In re Fried*, 161 F. 2d 453 (C.A. 2),[4] involving a motion to suppress a statement, and *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2), involving a motion to suppress narcotics (which of course were not returnable). In both those cases, as here, although no indictment had been returned, there seems to have been a preliminary hearing on the charge to which the evidence sought to be suppressed related, but the orders denying the motions to suppress were held appealable. Language in *United*

[3] It is also possible to distinguish most of those cases on the ground that they involved statements concerning tax liability so that the order could have effect on civil as well as criminal liability.

[4] The government filed a petition for a writ of certiorari in that case to review the holding that a mere statement, as distinguished from tangible property, was subject to a motion to suppress before trial. The petition was granted (331 U.S. 804) but was withdrawn (332 U.S. 807) for reasons unconnected with the legal merits of the ruling. The government remains of the view that the holding was erroneous and tends to delay prosecution, but the problem has not proved to be serious since the number of such motions brought has proved to be far less than anticipated.

States v. *Sinciro*, 190 F. 2d 397 (C.A. 3), is also contrary to that in the instant case, although in that case there is a separate ground for treating the motion to suppress as an independent proceeding since the criminal prosecution would be brought in a district other than that where the motion was made. Language in *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9), and *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2), as distinct from the actual holdings, is likewise contrary to that in the opinion below.

On the other hand, although, as petitioner states, *United States* v. *Williams*, 227 F. 2d 149 (C.A. 4), is distinguishable from the instant case because there an indictment had been returned before the order was entered, rather than pending appeal, the language of that opinion is in accord with that of the decision below in referring to a complaint and preliminary hearing as the start of a criminal prosecution. And *Nelson* v. *United States*, 208 F. 2d 505 (C.A. D.C.), certiorari denied, 346 U.S. 827, is in accord with the decision below in not treating the time of bringing the motion as conclusive.[5] The decision below seems to be the only one of its kind holding directly that an order on a motion to suppress and no more, both made and granted after complaint but before any indictment, is not appealable.

[5] If, on return of the indictment, the motion to suppress merges into the criminal case, as *Williams* and *Nelson* seem to suggest, then this case has become moot by reason of the return of the indictment against petitioner. However, we believe that, if the proceeding was an independent one when brought, it remains so for the purpose of appeal even if an indictment is subsequently returned. The Second and Ninth Circuits so hold. *Lapides* v. *United States*, 215 F. 2d 253 (C.A. 2); *Hoffritz* v. *United States*, 240 F. 2d 109 (C.A. 9). This is in accord with their view that the order is appealable whenever the motion to suppress is made before indictment, but is not necessarily dependent on that view.

2. Despite the conflict in decision discussed above, we doubt the necessity of resolution of the issue at this time and in this case. All the decisions relied upon by petitioner were rendered prior to the decision of this Court in *Carroll* v. *United States*, 354 U.S. 394, and those in direct conflict with the decision below were rendered before the decision in *United States* v. *Wallace Co.*, 336 U.S. 793. It is true that, in the *Carroll* case, the Court recognized the earlier cases relied upon by petitioner, saying (354 U.S. at pp. 403-404):

> Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment*, or in a *different district* from that in which the trial will occur, or *after dismissal* of the case, or perhaps where the emphasis is on the *return of property* rather than its suppression as evidence. In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision.

However, since the problem before the Court in the *Carroll* case (the right of the government to appeal from an order granting a motion to suppress brought after indictment) was different from that here involved, the Court had no occasion to consider the particular refinement to which the decision below relates, *i.e.*, whether a motion merely to suppress evidence, after preliminary hearing and before indictment, is part of the criminal case. The reason that we think the conflict on the present issue may not presently be of any importance is that both *Carroll* and *Wallace* seem

to us to have rendered outmoded any mechanical test of appealability which rests solely on the question of whether the motion is made before or after indictment. The *Carroll* case recognized, as *Cogen* v. *United States*, 278 U.S. 221, 225, had stated, and the *Wallace* case, 336 U.S. at pp. 801-803, had emphasized, that the " 'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in the criminal case." 354 U.S. at p. 404, fn. 17. The ruling here seems to us an application of that principle to these particular facts. The evidence to which the motion to suppress related, the narcotics taken from petitioner's person, was the basis of the charge on which the preliminary hearing was held, and the reason that petitioner was bound over for grand jury action. The motion to suppress had no purpose other than in connection with that criminal prosecution. There was no property which petitioner could get back, no indirect consequences beyond the criminal prosecution to which he would be subjected.[6] The admission of the evidence will be subject to review on appeal in the criminal case if a conviction is had. Under these circumstances, the court could properly find, in accord with the policy against piecemeal appeals, that the motion was so directly related to the criminal case as to be a part thereof.

As the paucity of cases illustrates, the situation here

[6] As already noted, in cases involving statements given to officers of the Internal Revenue Service, such as were involved in *Lapides* v. *United States*, 215 F. 2d 253 (C.A. 2), and *Centracchio* v. *Garrity*, 198 F. 2d 382 (C.A. 1), certiorari denied, 344 U.S. 866, there is prospective civil tax liability as well as prospective criminal prosecution. This may well serve to distinguish such cases from that involved here where the motion to suppress has no purpose beyond the criminal prosecution.

presented—a motion to suppress before indictment which serves no purpose beyond the attempt to prevent use of the evidence in a criminal prosecution—is not frequent. We suggest, therefore, that this narrow question of appealability can well be deferred by this Court pending possible consideration thereof in other circuits in the light of the decisions in *Wallace* and *Carroll*.[7] In this case there is no occasion for such review. The lack of merit in petitioner's attack upon the validity of the search is demonstrated by this Court's recent decision in *Draper* v. *United States*, No. 136, decided January 26, 1959. There is no reason for further delay.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] The ruling of the Fourth Circuit in *United States* v. *Williams*, 227 F. 2d 149, in 1955 was, as the opinion shows, deemed to be a particular application of the rule of the *Wallace* case. That circuit in a different setting considered the granting of a motion to suppress as appealable even after indictment. *United States* v. *Ponder*, 238 F. 2d 825 (C.A. 4).

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